IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 467 OF 1998

1. Rajeshsingh G.Singh]
2. Yashnathsingh Gyanshankar]
   Singh]
3. Sushma Singh]
4. Mrs. Santosh Singh]
   all of Bombay, Indian]
   Inhabitants, residing at]
   "Ashish" Building, Swami]
   Nityanand Marg (Sahar Road)]
   Andheri (East), Mumbai 400069]..Appellants
   (Original
   Obstructionists)

versus

1. Smt. Sunderabai G. Patkar]
2. Bhaskar Govind Patkar,]
   both residing at Raghav Wadi]
   Bombay 400 007]
3. Shivkedar Sampat Sharma]
4. Vijayshankar S. Singh]
5A Akbal Narayan]
5B Prabhu Narayan]
5C Avadh Narayan]
5D Rama Niwas]
5E Santosh Kumar]

sons of deceased respondent]
No.5, all residing at Village]
Jamunipur, Post : Jakkhini]
District Varanasi]
6. Harishankar Shivkedar]
7. Sharda Prasad]
all of Bombay, Indian]
Inhabitant, originally]
residing in "Ashish" Bldg.]
(Patkar Bldg), Swami]
Nityanand Marg (Sahar Road)]
Andheri (E), Mumbai 400069]..Respondents

Mr. M. P. Vashi for the Appellants.
Mr. Nitin Shukla for the Respondent No.1 and 2.

CORAM : D. G. DESHPANDE,J.
DATE : 11TH APRIL,2005

ORAL JUDGMENT :

1. Heard Counsel for the Appellants and Respondent Nos. 1 and 2.

2. The appeal is filed by the appellants against the order in Chamber Summons No. 597 of 1996 in B.C.C.C. Suit No. 2056 of 1964, decided by

the Judge of the City Civil Court dated 24.4.1998. The Chamber summons was against the present obstructionists as also for removal of obstruction in execution of the decree.

3. Decree for possession was passed in Suit No.2056 of 1964. Execution Application No. 522 of 1995 was taken out by the decree holder - plaintiff, warrant of possession was issued on 16.10.1995. As per the report of the bailiff dated 20.10.1995 when the decree was to be executed the obstructionists obstructed the execution. The executing court or trial court treated chamber summons as one under Order XXI Rule 97 of the Code of Civil Procedure. The Chamber Summons was opposed by the present appellants. It was contested as if it was a original suit, and by a reasoned order, considering all the submissions made by the respective parties, the chamber summons No.597 of 1996 was made absolute in terms of prayer clause (a) and therefore the present appeal.

4. Before appreciating the submissions of Mr. Vashi, it is necessary to go to the background of this matter. Original Suit No. 2056 of 1964 was filed by Govind Yeshwant Patkar. He died and the present plaintiffs - respondents were therefore on record in his place. There were five defendants in

the original suit :

1. Shivkedar Sampat Sharma
2. Vijayshankar Shivmurat Singh
3. Chandramalsingh Budasingh
4. Harishankar Shivkadam
5. Sharda Prasad

In that suit declaration was sought by the original plaintiff Govind Yeshwant Patkar that the agency of the defendant No.1 was duly revoked and that the defendants had no right to remain in the premises and for other reliefs. The plaintiff was the owner of the building viz. Patkar Building at Andheri (East), he wanted to do his business in the two shops on 1st floor being Shop Nos. 1 and 2. He entered into an agreement with defendant No.1 as agent for the fruit business vide Agreement dated 22.6.1961. Defendant Nos. 2 to 4 were relatives of the Defendant No.1 and Defendant No.5 was the licensee of defendant No.1. On or about 20.2.1962 defendant No.1 prevented the plaintiff from entering the suit premises and therefore agency agreement was revoked. This suit was heard, decided and ultimately a decree came to be passed in terms of prayers (a), (b), (b-i), (b-ii) and (g) of the plaint against defendant Nos. 1 to 4 and the decree was restricted to Shop Nos. 1 and 3 and Block No.1.

5. The original defendants challenged this decree before this court vide Appeal No. 1 of 1978. Justice Agarwal on 3.4.1991 dismissed the appeal. Then Letters Patent Appeal No.57 of 1991 was filed by the defendants. By an order dated 4.9.1991 passed by the Division Bench of this Court (comprising of P.D. Desai, C.J. and V.P. Tipnis, J) the appeal was dismissed. Then original Defendant Nos. 1, 2 and 4 took out three different Notices of Motion for setting aside the exparte decree on the ground that they were not duly served. City Civil Court on 19.12.1991 dismissed all those Notices of Motion. Three different Appeals from Order were filed in this Court wherein consent terms were filed. Appeals from Order were disposed of and thereafter from 1995 onwards execution proceedings started, to which there was obstruction.

6. Contention of the obstructionists before the Chamber Judge as reflected by the issues in the impugned order were as under:

> 1. Whether the chamber summons was not maintainable for non joining Mansa and Renu, sisters of obstructionist No.1?
>
> 2. Whether non serving Hindi translation of

the proceedings vitiate the chamber summons?

3. Whether due to pendency of their declaratory suit No. 192/6645 of 1974 the chamber summons could not be proceeded with?

4. Whether decree in Suit No.2056 of 1964 was fully satisfied and fresh tenancy was created in favour of their father by the present owners who were the purchasers of the plaintiffs' right?

City Civil Court deciding the Chamber Summons negatived all the contentions raised by the present appellants / obstructionists, and therefore this Appeal.

7. Mr. Vashi, did not raise all the aforesaid contentions before me. According to him the decree passed in Suit No. 2056 of 1964 in 1977 is a nullity. For that purpose, Mr.Vashi, made me available copy of the plaint in Suit No.2056 of 1964. As per that plaint Govind Patkar was owner of Patkar Building and he inducted original defendants for running the business. Thereafter the plaint was amended and paragraph 8A was introduced wherein the Plaintiff Govind Patkar stated that at the time of institution of the suit he was the owner of the

building containing the suit premises but now the building was sold. The plaintiff was accepted as a tenant of the suit premises by the present owners and he being the lawful tenant of the premises he had a right to evict the defendants as trespassers. Mr. Vashi therefore contended that if Govind Patkar was the owner of the building and if in the conveyance between him and his purchasers Kurlawala, Govind Patkar is not treated or recognized as a tenant, then contention of Govind Patkar that he was a lawful tenant should not have been accepted. It was contrary to law. No evidence was there and therefore the decree, is without basis and is therefore nullity.

8. This contention is required to be rejected outright. There is no legal bar or prohibition in Govind Patkar selling his building and then becoming tenant of the same building vis-a-vis new purchaser. If Kurlawala recognized Govind as a tenant and did not oppose or object to the proceedings initiated by Govind by the aforesaid suit No. 2056 of 1964 then nobody could challenge the status of Govind as a tenant. Further all those issues have been considered, decided and concluded by judicial process upto SLP and now this obstructionist cannot be permitted to raise those issues. Therefore contention without going into any further details

has to be rejected.

9. Second contention of Mr. Vashi was that Chandramalsingh Budasingh - Defendant No.3 died during execution, his heirs were not brought on record and therefore the decree had become unenforceable. I do not find any substance in this argument also. The present Appellants or the obstructionists are all the sons of original defendants. The decree against whom was passed by the City Civil Court, it was uphold upto the stage of SLP. Three notices of motion taken out by defendants were dismissed and apart from that so far as execution proceedings are concerned, there is nothing on record to hold that other legal heirs of Chandramalsingh were obstructionists. Those who were obstructionists were served with the chamber summons, they appeared, contested and lost.

10. Mr. Vashi, thereafter contended that the obstructionists are in possession since even before the passing of the decree or thereafter, therefore they were in possession in 1973 and hence they are entitled for protection under the Bombay Rent Act. He relied upon a judgment of this Court reported in **2005(2) Bom.C.R. 470 Gordhandas Lalchand vs. Kubchand Tirthdas Tailor & Ors.** The petitioner in that case was the owner of "Sudama House".

Respondent No.1 was his monthly tenant doing business of tailoring at the suit premises. Sometime in 1963 respondent No.1 went to Gujarat and assigned his tenancy rights in favour of respondent Nos.2 and 3 and put them in possession of the suit premises. Since the rent was not paid for several months and respondent Nos. 2 and 3 were inducted illegally as sub tenant, the petitioner terminated the tenancy and eviction suit came to be filed in 1966 against all the respondents. During the pendency of the suit, respondent No.2 died. His heirs were not brought on record. The suit was decreed, execution was started and then respondent Nos. 4 and 5 who were the son and grand son of respondent No.2 obstructed the execution. In that view of the matter, Justice Daga held that in view of the Amendment of Section 15(2) of the Rent Act with retrospective effect from 1.2.1973 during the pendency of execution the respondent Nos. 4 and 5 were entitled for protection and decree was not executable.

. The aforesaid case is of no help to the present appellants. The most important and the only distinguishing factor is that the original respondent no.2 had died during the pendency of the suit as his L.Rs. were not brought on record, therefore the obstructions - respondent Nos. 4 and

5 who were his L.Rs. were entitled for protection. In the instant case a decree has been passed against the original defendants by the City Civil Court, it was maintained and in the First Appeal as also in the Letters Patent Appeal; all Notices of Motion taken out were dismissed and now in execution, these objections are being raised by the appellants, who are the sons of the original Judgment Debtor. In fact they cannot raise any issue because all those judgments passed against the original defendants are binding upon them. All these issues which they are now raising have been decided and there is nothing in the decree which can be challenged by the present appellants as a nullity or on account of any legal defect in it.

11. However, the entire case of the appellants stands destroyed by only one circumstance that was pointed out to me by the counsel for the respondents i.e. undertaking given by the defendant No.1 through his Advocate Mr. Vashi. That undertaking is dated 9.3.1992. It is addressed by M.P. Vashi Associates to Nagnath D. Hombalkar Advocate for Bhaskar Govind Patkar, with reference to Appeal Nos.603, 669 and 670 of 1992 wherein Mr. Vashi has stated that he is concerned for his clients Gyanshankar Singh Shivkedar Sharma, (2) Vijayshankar Shivmurat Singh and (3) Harishankar Shivkadam and

the undertaking was to the effect that these defendants or clients of Mr. Vashi will not create third party interest in the premises. In the compilation of documents, these three undertakings are separately there. Therefore Advocate for the Respondents contended that if the original defendants including Gyanshankar Singh Shivkedar Sharma who is father of the present appellants had given an undertaking that he will not create any third party rights in respect of the suit premises, the contention of the appellants that they are the tenant, has to be outright rejected because no tenancy rights could have been created by any one of the defendants after passing of the decree and after giving this undertaking. Counsel for the respondents also contended that the tenancy agreement dated 15.12.1995 between Kurlawalas and defendant No.1 Gyanshankar Singh - father of the present appellants is null and void because of this undertaking and the appellants therefore cannot get any right in the property. This submission has to be accepted because it is in direct breach of the undertaking given to the court. Further if Govind Patkar had obtained a decree against the original defendants to the effect that they were trespassers and liable to be evicted and that decree was confirmed by this court in First Appeal and in Letters Patent Appeal, then it was beyond the powers

of Kurlawala to enter into a tenancy agreement with Gyanshankar in respect of the same premises to which Govind Patkar claimed to be the tenant and the original defendant No.1 getting possession through Govind Patkar. Therefore this agreement is of no help. It is completely illegal.

12. Mr. Vashi, as against this submission of undertaking, contended that firstly point of undertaking was not raised before the executing court and that defendant No.1 had not given any undertaking.

13. I do not find any merit in this submission. The letter is written by and on behalf of Mr. Vashi himself and now he cannot go beyond it. Therefore, to sum up this is nothing but an attempt by the obstructionist to create obstacles in the way of execution of the decree. They have no iota of right in their favour, they are rank trespassers under the original decree, they are not entitled to any kind of protection. The trial court has given very well reasoned judgment and considered all the aspects of the matter and has given a right conclusion. In the result I pass the following order:

ORDER

. Appeal is dismissed with compensatory costs of Rs.10,000/-

. Receiver to continue in execution.

. After this order was pronounced counsel for the Appellants requested for staying operation of this order for a period of eight weeks. Since I have found that the case of the Appellants is false and bogus, prayer for stay is rejected.

. Royalty charges paid by the Appellants to the Court Receiver to be returned to respondent No.1 after deducting expenses of the Court Receiver.

. In view of this order, the contempt petition is not pressed by the counsel for the respondents, however, respondent No.1 will be at liberty to seek any other relief on the basis of alleged breaches. Contempt petition No. 25 of 2002 stands disposed of accordingly.

11.04.2005 (D.G. DESHPANDE, J.)